Supreme Court, U.S.
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No. 99-163

In The

Supreme Court of the United States

ROBERT BAGLEY, et al.,

Petitioner,

v.

RAYMOND SCHOOL DISTRICT, et al.,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* TEXAS JUSTICE FOUNDATION; CENTER FOR EDUCATION REFORM; CITIZENS AGAINST GOVERNMENT WASTE; LIBERTY LEGAL INSTITUTE; REPUBLICAN NATIONAL HISPANIC ASSEMBLY OF TEXAS; SCHOOL FOR EDUCATIONAL ENRICHMENT; TEXAS PUBLIC POLICY FOUNDATION; AND TOWARD TRADITION IN SUPPORT OF THE PETITION

ALLAN PARKER
Counsel of Record
Texas Bar No. 15505500
CLAYTON TROTTER
Texas Bar No. 20240500
8122 Datapoint, Suite 812
San Antonio, TX 78229
Phone: (210) 614-7157
Fax: (210) 614-6656
Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Establishment Clause of the First Amendment to the U.S. Constitution forbid the inclusion of faith-based schools in a tax-funded tuition program?

MOTION OF TEXAS JUSTICE FOUNDATION, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

TO THE HONORABLE COURT:

COMES NOW, TEXAS JUSTICE FOUNDATION (TJF) and files this Motion for Leave to File Brief as Amicus Curiae on its own behalf and that of other Amici.

The TEXAS JUSTICE FOUNDATION is a 501(c)(3) non-profit law firm that has as its mission the protection of free markets, religious liberty, parental rights and limited government. The Texas Justice Foundation seeks, through litigation and education, to protect the rights essential to the preservation of American liberty.

A party may seek leave of this Court to file a brief as amicus curiae on issues raised by the case. Rule 37.2(b). Accordingly, the Texas Justice Foundation files this amicus brief because of its interest in parental rights and in government neutrality regarding issues of religious belief. The exclusion of faith-based schools from government educational programs is a form of invidious discrimination prohibited, rather than required, by the First Amendment. Given the religious beliefs of the majority of Americans, governmental policies which seem to imply hostility toward a religious world view are likely to incite, rather than avoid, division and polarization.

The following parties have consented to the filing of this Amicus Brief: Petitioners – Cynthia and Robert Bagley, Gary and Cynthia St. Pierre, Dennis and Patricia Cole, Ricky and Mary Thornton, and Jack and Stacia Fitch; Respondents – Maine Department of Education and its Commissioner J. Duke Albanese, Timothy Humphrey, Jane Humphrey, Frank McDermott, Timothy Morin, Joan

Morin, Timothy Fitzgerald, Ken Williams, Barbara Williams and the Maine Civil Liberties Union. The following parties have not responded to the Texas Justice Foundation's request for consent: Raymond School Department.

The TEXAS JUSTICE FOUNDATION therefore moves this Court for leave to file a brief as Amicus Curiae, and asks this Court to accept for filing the attached brief of Amicus Curiae TEXAS JUSTICE FOUNDATION in support of the petition for Writ of Certiorari on this the 30th day of August, 1999.

Respectfully submitted,

ALLAN E. PARKER, JR.
Texas Bar No. 15505500
CLAYTON TROTTER
Texas Bar No. 20240500
8122 Datapoint, Suite 812
San Antonio, TX 78229
Phone: (210) 614-7157
Fax: (210) 614-6656
Counsel for Amicus Curiae
Texas Justice Foundation

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. Maine's exclusion of religious schools from the tuitioning program is a denial of equal protection based on religion, subject to strict scrutiny 6

II. The Establishment Clause does not forbid Maine from including religious schools in its "tuitioning" program 9

A. Inclusion of religious schools in Maine's voucher program would not compromise its secular purpose. The program would remain "a general program not skewed toward religion." 9

B. Inclusion would not have the primary effect of advancing religion, since aid would reach religious schools only as a result of the "private and independent choices of aid recipients." 10

C. Inclusion of religious schools would not lead to excessive entanglement between government and the church 13

III. Maine's decision to fund secular educational speech by private schools but not theocentric educational speech is viewpoint discrimination forbidden by the First Amendment 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. Felton, 473 U.S. 402 (1984); *overr'd by Agostini v. Felton*, 521 U.S. 203 (1997) 13

Bagley v. Raymond School Department, 728 A.2d 127 (Maine 1999) 4, 5, 11

Barnett v. West Virginia, 319 U.S. 624 (1943) 14

Brusca v. Missouri ex rel. State Board of Education, 332 F. Supp. 275, *aff'd*, 405 U.S. 1050 (1972)..... 6

Committee for Public Education and Religious Freedom v. Nyquist, 413 U.S. 756 (1973)..... 11

Employment Division, Dept. of Human Services of Oregon v. Smith, 494 U.S. 872 (1990).....5, 8

Jackson v. Benson, 578 N.W.2d 602 (Wisconsin 1998) ...4, 5

Lemon v. Kurtzman, 403 U.S. 602 (1971)..... 13

McDaniel v. Paty, 435 U.S. 618 (1978)..... 8

Meek v. Pittinger, 421 U.S. 349 (1975) 11, 13

Meyer v. Nebraska, 262 U.S. 390 (1923)..... 14

Perry v. Sindermann, 408 U.S. 593 (1972)..... 7

Pierce v. Society of Sisters, 268 U.S. 510 (1925).....14, 16

Rosenberger v. Rector, 515 U.S. 819 (1995) 6, 14, 15

Strout v. Albanese, 1999 WL 329272 (1st Cir.(Me.)) 5

School District of Grand Rapids v. Ball, 473 U.S. 373 (1985) 11, 12

Simmons-Harris v. Goff, 1999 WL 349689 (Ohio) 5

TABLE OF AUTHORITIES – Continued

Page

Torcaso v. Watkins, 367 U.S. 488 (1961) 7, 8

Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) 6, 9, 10

Zobrest v. Catalina Hills School District, 509 U.S. 1 (1993) 5, 10

Zorach v. Clauson, 343 U.S. 306 (1951) 12

STATUTES

Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. Sec. 604a 11

Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937 15

BRIEF OF *AMICI CURIAE* TEXAS JUSTICE FOUNDATION AND OTHERS IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioner.[1]

INTEREST OF THE *AMICI CURIAE*

The *Center for Education Reform* is a national, non-profit advocacy organization founded in 1993 to provide support for fundamental reforms to public schools. CER seeks to ensure that ideas critical to education reform are identified, understood and implemented. CER works to build coalitions with diverse constituencies to improve access, accountability and assessment and to help restore educational excellence and equity. The Center believes that inclusion of faith-based schools in voucher programs will expand and diversify educational opportunities for children.

Citizens Against Government Waste (CAGW) is a 600,000 member, private, non-partisan, non-profit organization dedicated to educating Americans about the waste, mismanagement and inefficiency in the federal government. Founded in 1984 by the late industrialist J. Peter Grace and syndicated columnist Jack Anderson, CAGW is the legacy of the President's Private Sector Survey on

[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* and their counsel contributed financially to the preparation of this brief.

Cost Control, also known as the Grace Commission. CAGW has long favored vouchers because they bring competition into the educational system and increase efficiency, ultimately saving taxpayer dollars.

Liberty Legal Institute is a legal organization specializing in the defense of religious freedoms and First and Fourteenth Amendment rights. The Institute is very concerned about attempts to misuse the Establishment Clause to justify discrimination against religious citizens and groups. Such exclusion of religious groups is central to the instant case, making it of great interest to the Institute.

The *Republican National Hispanic Assembly of Texas* is a non-profit, political organization composed of 14 County Chapters of the RNHA throughout Texas. RNHA chapters are local organizations of mostly Hispanic Americans who espouse limited government, lower taxes, a strong national defense, and school vouchers. The RNHA of Texas believes that the inclusion of religious schools in voucher programs is not prohibited by the First Amendment, and urges this Court to grant certiorari to the Petitioners.

The *School For Educational Enrichment* is a secular private school in El Paso, Texas. The School believes that many religious schools offer excellent academic services, and that educational reform will require the participation of all segments of our society.

The *Texas Conservative Coalition* (TCC) is an organization *of* and *for* state legislators committed to shaping public policy through the promotion of conservative principles – limited government, individual liberties, free

enterprise and traditional family values. It is the position of the Coalition that parents have a fundamental right to direct the education and upbringing of their children. A ruling for the Petitioners in this case would enhance a parent's right to decide which school can most appropriately educate their child.

The *Texas Justice Foundation* is a 501(c)(3) non-profit organization which provides free legal representation in landmark cases involving limited government, free markets, private property, and parental rights. The Foundation seeks, through litigation and education, to protect the fundamental freedoms essential to the preservation of American society. The Foundation favors parental choice in education, and believes that the exclusion of faith-based schools from taxpayer funded tuition programs is impermissible religious discrimination.

The *Texas Public Policy Foundation* is a 501(c)(3) non-profit, non-partisan research institute. TPPF conducts public policy research and presents its findings to policy makers and the general public. The Foundation believes that the Constitution permits the inclusion of faith-based schools in voucher programs, and that such schools often offer the best educational options for children in economically marginalized areas.

Toward Tradition is a non-partisan movement of Jews allied with Christians who want to apply traditional ideas to America's cultural, political and economic life. Jewish tradition teaches that parents, not government, have the primary responsibility for educating their children. We believe that government should pursue policies that encourage the greatest possible parental control over

their children's education. For this reason, we believe that religious schools should not be excluded from programs such as Maine's "tuitioning" program.

SUMMARY OF THE ARGUMENT

Amici respectfully submit this brief to urge the Court to hear the appeal of the Petitioners. The Maine Supreme Judicial Court's application of the Establishment Clause in this case squarely conflicts with that of this Court and of other state supreme courts which have applied its precedents. The court below has erroneously held that the First Amendment of the U.S. Constitution requires the exclusion of faith-based schools from state-funded, neutral tuition programs. The Establishment Clause does not require such exclusion. In fact, such exclusion is facially unconstitutional viewpoint discrimination.

The split between state supreme courts on this question is best illustrated by comparing the holdings of the court below to the holding of the Wisconsin Supreme Court in *Jackson v. Benson*, 578 N.W.2d 602 (Wisc. 1998), *cert. denied*, 119 S.Ct. 466. Maine's Supreme Judicial Court held unequivocally that " . . . [I]n the absence of that exclusion [of religious schools], Maine's tuition program would violate the Establishment Clause." *Bagley v. Raymond School Department*, 728 A.2d 127, 143. (Maine 1999). However, the Supreme Court of Wisconsin, ruling on a similar program which welcomes the participation of religious schools, ruled just as unequivocally, "Does the amended Milwaukee Parental Choice Program violate the Establishment Clause of the First Amendment? . . . We

conclude that it does not." *Jackson v. Benson*, 578 N.W.2d 602, 607 (Wisconsin 1998).

Recently the U.S. Court of Appeals for the First Circuit, in a case which parallels this one, held that the Establishment Clause required Maine's exclusion of religious schools. *Strout v. Albanese*, 1999 WL 329272 (1st Cir.(Me.)) However, the Supreme Court of Ohio recently held that inclusion of religious schools in an experimental voucher program did not violate the Establishment Clause. *Simmons-Harris v. Goff*, 1999 WL 349689 (Ohio). There is a pressing need for the Court to resolve this conflict and give courts and legislatures a bright-line rule. *Bagley* is the ideal opportunity for the Court to do so, since its holding turns largely on the Establishment Clause question. "The state does not dispute that its *only* justification for excluding religious schools from the tuition program was compliance with the Establishment Clause." *Bagley*, at 131. (emphasis added).

First, the exclusion of religious schools from Maine's voucher program is, on its face, a denial of equal protection based on religion. A government policy which discriminates according to religion is unconstitutional unless it is narrowly tailored to serve a compelling governmental interest. *Employment Div., Dept. of Human Services of Oregon v. Smith*, 494 U.S. 872, 888 n.3 (1990).

Second, no such compelling interest exists, because the Establishment Clause does not require that faith-based schools be excluded from publicly funded voucher programs. In *Zobrest v. Catalina Hills School District*, 509 U.S.1 (1993), this Court held that the Establishment Clause is not offended when parental choice causes faith-

based schools to benefit from a general program not skewed toward religion. In *Witters v Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), this court reiterated that the Constitution permits governmental benefits to students in faith-based schools provided that such payment results from the independent and private choices of aid recipients.

Third, the Free Speech clause forbids the exclusion of religious schools from tax-funded programs open to all other non-governmental schools. This Court held in *Rosenberger v. Rector*, 515 U.S. 819 (1995), that the exclusion of religious voices from a state-created limited public forum is impermissible viewpoint discrimination. Maine has chosen to create a limited public forum for non-governmental educational speech through its "tuitioning" program, and its decision to subsidize educational speech by secular private schools but not religious private schools violates the rule of *Rosenberger*.

ARGUMENT

I. Maine's exclusion of religious schools from the tuitioning program was a denial of equal protection based on religion, subject to strict scrutiny.

Respondents caricature the position of the Petitioners as a claim that the right of free exercise of religion equals a right to subsidy of religion. Therefore, Respondents cite *Brusca v. Missouri ex rel. State Board of Educ.*, 332 F. Supp. 275, *aff'd*, 405 U.S. 1050 (1972). In *Brusca*, the plaintiffs argued that the Constitution required Missouri to fund all of that state's sectarian schools. The Bagleys do not claim

anything resembling the sweeping entitlements rejected in *Brusca*. They merely claim that, having set up a tuition program which includes private schools, Maine cannot discriminate among those private schools on the constitutionally impermissible grounds of religion. As this court stated in *Perry v. Sindermann:*

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest."

Sindermann, 408 U.S. 593, 597 (1972).

An analogous question arose in *Torcaso v. Watkins,* 367 U.S. 488 (1961). Torcaso, an atheist, challenged a Maryland statute that required a belief in God as a qualification for public office. Maryland argued that the state was not *compelling* Torcaso to pretend belief, since holding public office was voluntary. The Court replied that "The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." *Torcaso,* at 496.

The State of Maine may have had no obligation to include private schools in this tuition program at all. However, having chosen to include private schools, the state does have an obligation to refrain from discriminating between them on the constitutionally impermissible

basis of religion. The 1981 amendment to M.R.S.A. established a religious test – or, rather, an irreligious test – for private schools to participate. This is, to paraphrase *Torcaso*, a state-imposed criteria forbidden by the Constitution.

Petitioners and *amici* contend that Maine's exclusion of sectarian schools is a neutral law of general applicability and therefore need only meet the rational basis test under the rule of *Employment Div., Dept. of Human Services of Oregon v. Smith,* 494 U.S. 872 (1990). However, a policy is not neutral simply because it disfavors all religions equally. The exclusion's acknowledged purpose was to discriminate according to religious classification. It is, on its face, neither neutral nor of general applicability. "[T]he exclusion manifests patent hostility toward, not neutrality respecting, religion." *McDaniel v. Paty,* 435 U.S. 618, 636 (1978) (States cannot bar clergy from public office).

This court has held that "Just as we subject to the most exacting scrutiny laws that make classifications based on race, or on the content of speech, so too we strictly scrutinize governmental classifications based on religion." *Smith,* 494 U.S. at 888, n.3 (internal cites omitted). A law which facially discriminates on a religious basis is unconstitutional unless it is narrowly tailored to serve a compelling governmental interest. The court below held that the need to avoid violation of the Establishment Clause was such an interest, but, as shown below, inclusion of religious schools on a neutral basis would not violate the Establishment Clause.

II. The Establishment Clause does not forbid Maine to include religious schools in its "tuitioning" program.

A. Inclusion of religious schools in Maine's voucher program would not compromise its secular purpose. The program would remain "a general program not skewed toward religion."

Maine's secular purpose of guaranteeing a secondary education to every child would not be compromised by inclusion of religious schools on a neutral basis. The Bagleys seek no general subsidy for religious school systems, nor do they seek impermissible financial incentives for parents to send their children to religious, rather than secular schools. They ask only that the program be "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Witters v. Washington Dept. of Social Services for the Blind*, 474 U.S. 481, 485 (1985).

Maine's secular public interest in educating children is actually disserved when otherwise eligible schools are excluded on religious grounds. The Constitution does not require this discrimination. Many faith-based schools provide educational services that, by objective standards, are competitive, if not excellent. For example, several of the parents who were original plaintiffs in this action wanted to send their children to Cheverus not because of its Catholic orientation but because of the school's reputation for academic excellence and modest tuition. It is hardly in the public interest to exclude such high-performing schools from participation. Since the "tuitioning" program is limited to rural areas where educational

options are limited, exclusion of faith-based schools may deny students their best and most affordable options.

B. Inclusion would not have the primary effect of advancing religion, since aid would reach religious schools only as a result of the "private and independent choices of aid recipients."

The Court has held that participation of religious schools in state educational programs does not have the primary effect of advancing religion provided the aid reaches the religious school "as a result of the genuinely independent and private choices of the aid recipients", and "creates no financial incentive for students to undertake sectarian education". *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481, 488. (Establishment Clause permits recipient to use state grant at a seminary); *Zobrest v. Catalina Hills School District*, 509 U.S. 1, 9 (1993) (Establishment Clause permits state to provide sign language interpreter for parochial school student). Like the vocational grants at issue in *Witters*, the beneficiaries of Maine's program are the students, not the school. The grants provide direct support for the education of children, not for the operation of the schools chosen by their parents.

Sectarian schools would receive only those funds which the state allots for the education of the students attending them under the auspices of the program. Just as inclusion would create no financial incentive for parents to choose sectarian schools over secular ones, it would create no government subsidy for the overall mission of

the schools. The court below asserts that a "direct financial subsidy" would flow to religious schools if the program included them, but this is not borne out by the record. The court later acknowledges that Maine's tuition allotment would cover only 70% of the actual cost of educating a student at the Catholic high school the Bagleys preferred for their son. *Bagley*, at 145. The state is not "subsidizing" a school by paying that school to educate a child at a financial loss.

In cases where this court has found aid to religious schools to be barred by the Establishment Clause, that aid was in the form of direct grants or subsidies given solely to religious schools. *Committee for Public Education and Religious Freedom v. Nyquist*, 413 U.S. 756; *Meek v. Pittinger*, 421 U.S. 349 (1975); *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). In contrast, Maine essentially pays schools chosen by parents to educate students whose own school districts do not operate secondary schools. If Maine included religious schools on a neutral footing, it would merely be contracting with parents to provide a social service, as states are encouraged to do in other areas such as child care under Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. Sec. 604a. At this writing, there has not been a single Establishment Clause challenge to the provision of social services under the Act. As Petitioners state, the subsidies rejected in *Nyquist*, *Meek* and *Ball* were, essentially, *gifts* and therefore constituted direct aid to schools; vouchers are a *purchase*. And, significantly, the vendor for that purchase is selected by the parents, not the state.

The evils the Establishment Clause seeks to prevent – competition among sects and compulsion of belief – are not at issue here, because Maine's program benefits *children*, rather than *schools*.

The element of parental choice should prevent neutral inclusion of religious schools from being defined as a governmental advancement of their religious mission. In *Zobrest v. Catalina Hills School District*, 509 U.S. 1, this court held that since the parents of the child receiving assistance had initiated his placement in a sectarian school, the presence of the child's state-funded interpreter could not be attributed to state decisionmaking. *Id.*, at 10. In Maine's tuition program, school selection is also dictated by parents, and, unlike *Zobrest*, there is no government employee present who might be seen as "a graphic symbol of the 'concert or union or dependency' of church and state". *School District of Grand Rapids v. Ball*, 473 U.S. 373, 386 (1985). Maine included faith-based schools in its tuitioning program for 200 years prior to the 1981 exclusion. During that time no court, federal or state, ever held that their participation was unconstitutional.

This court has long held that the Establishment Clause does not contain " . . . [A] requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 312 (1951). Maine's blanket exclusion of religious schools manifests governmental disfavor if not hostility to religion, and therefore aggravates, rather than minimizes, the potential for division along religious lines. A perception by people of faith that their worldview is

being quarantined or treated as suspect will further undermine support for public education. The inclusion of religious schools on a neutral basis would place Maine's tuition program in a constitutionally safe ground, neither impermissibly advancing religion nor impermissibly treating it with the "callous indifference" denounced in *Zorach*.

C. Inclusion of religious schools would not lead to excessive entanglement between government and the church.

"Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall', is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." *Lemon v. Kurtzman*, 403 U.S. 602. Earlier school cases in which the court grappled with questions of excessive entanglement between government and religious schools involved radically different circumstances than those present here. Claims of excessive entanglement involved either direct government subsidies to the schools or the direct provision of educational services by government employees. The questioned entanglement resulted either from measures to ensure that government employees did not participate in religious instruction (*Aguilar v. Felton*, 473 U.S. 402 (1984); *overr'd by Agostini v. Felton*, 521 U.S. 203 (1997)) or from measures to ensure that direct subsidies given to religious schools without consideration were not used for religious indoctrination. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Meek v. Pettinger*, 421 U.S. 349 (1975). The hands-on nature of the state aid in *Lemon* and *Meek*

required "pervasive monitoring by public authorities," *Lemon* at 615.

Since inclusion of religious schools in Maine's voucher program would allow the state a hands-off stance, without the presence of government employees and without general subsidies, the monitoring which fostered entanglement in these situations would not be necessary. School district involvement with participating schools is largely limited to writing a check for the allotted amount to the school selected by the parents. Presumably Maine evaluates schools which seek to participate in the program to discern whether they meet educational standards, but there is no reason to believe such evaluations would involve greater entanglement than the inquiries that such schools already undergo to maintain accreditation.

III. Maine's decision to fund secular educational speech by private schools but not theocentric educational speech is viewpoint discrimination forbidden by the First Amendment.

Education inherently involves speech, and the Free Speech clause is therefore deeply implicated in educational issues. The Court has recognized this in a variety of cases, ranging from *Barnett v. West Virginia*, 319 U.S. 624 (1943), to *Rosenberger v. Rector*, 515 U.S. 819 (1995). In fact, one commentator has suggested that *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), in which the Court defended the existence and autonomy of private schools, would have been more cogently argued and decided on First Amendment

grounds of parental "educative speech" rather than on substantive due process grounds. (Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937).

In *Rosenberger v. Rector, supra*, this court held that the exclusion of a student magazine which discussed issues from a Christian viewpoint from a program which funded publications discussing identical issues from a variety of other philosophical viewpoints was a violation of the Free Speech Clause of the First Amendment. The *Rosenberger* Court held that the University's decision to fund student publications had created a limited public forum, albeit "more in a metaphysical than in a geographic or spacial sense," *Id.*, at 829. Therefore, the Court employed the standard First Amendment analysis pertaining to such forums:

> [I]n determining whether . . . the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Rosenberger, at 829-830.

If the University of Virginia's allocation of student fees to student publications in *Rosenberger* created a limited public forum for student speech, then Maine's decision to include private schools in its tuitioning program created a limited public forum for non-governmental educational speech. According to the rule of *Rosenberger*,

Maine has a right to discriminate regarding the *contents* of that educational speech to preserve the educational purposes of that limited forum, but not to discriminate regarding the *viewpoint* of that speech.

What does this test mean when applied to the facts of this case? First, an obviously permissible *content* restriction is to limit participation in the tuitioning program to those schools which meet objective educational standards. "[States may] reasonably regulate all schools . . . and [mandate] that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." *Pierce v. Society of Sisters*, 268 U.S. 510, 534. For Maine to limit participation in the program to accredited schools is a reasonable and Constitutional measure to preserve the purpose of the educational forum.

What Maine *cannot* do within the limited educational forum it has created it to exclude an otherwise eligible school because of the *viewpoint* of its educational speech. Having ascertained that a given private school competently conveys knowledge about academic subjects, about which there is no dispute in this case, Maine cannot exclude that school simply because it presents those subjects from a viewpoint disfavored by the state.

It is uncontested that Maine's exclusion of faith-based schools is based on the *viewpoint* of their curriculums, rather than their *content*. Neither the state respondents nor *amici* question the academic competence of Cheverus, the Catholic high school to which the Bagleys would prefer to send their children. Neither the school district nor the court below contends, in the words of

Pierce, that Cheverus omitted subjects "essential to good citizenship", nor that it taught subjects "manifestly inimical to the public welfare." *Id.*, at 534. Cheverus was excluded from participation because it was "sectarian", which simply means that it teaches academic subjects from a theocentric viewpoint. According to *Rosenberger*, exclusion based on this criteria should be "deemed impermissible." *Id.*, at 830.

CONCLUSION

For all the foregoing reasons, *amici curiae* strongly urge this Court to grant the requested Petition for Writ of Certiorari.

Respectfully submitted,

ALLAN PARKER
Texas Bar #15505500
CLAYTON TROTTER
Texas Bar #20240500
8122 Datapoint, Suite 812
San Antonio, TX 78229
Phone: (210) 614-7157
Fax: (210) 614-6656
Counsel for Amicus Curiae
Texas Justice Foundation